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CURRENT TOPICS

Lord Schuster

FOR nearly thirty years LORD SCHUSTER was in everything except name the Permanent Secretary of the Ministry of Justice. His influence on judicial history during those years must have been immense and yet he himself made no mark in practice at the Bar. His activities lay almost entirely on the fringes of and within the administrative machine. It is interesting to speculate whether he would have done better or worse as Clerk of the Crown and Permanent Secretary to the Lord Chancellor if he had spent several years in active practice at the Bar. The answer is probably not. Barristers do not necessarily make good administrators and a civil servant is none the worse for not having participated in the activities which he is called on to administer. However that may be, Schuster was a good lawyer as well as a good administrator. He lived to a ripe age and the span of his public activity covered half a century, for he did not fade out of the picture when he retired in 1944. We mourn his passing.

Rent Control—A Plan

"HOUSES OF THE FUTURE," published on 25th June by the Labour Party, is a document of more than political importance, because it is an attempt to provide a complete solution of the many problems of housing. The success or failure of the attempt depends only partly on the fact that the bias of the authors is inevitably in favour of nationalisation policies. A non-political examination of the proposals, and particularly of those dealing with the legal problems of rent control, is clearly necessary. All tenant-occupied dwellings controlled on 1st January, 1956, it is stated, some 6 millions in all, should be taken over at a fair compensation to the owners. Since attempts to encourage landlords to carry out repairs and improvements have failed, it is said, this solution is necessary. Owing to the possibility of revision or repeal of the Rent Acts by the present Parliament, the authors fix the date at 1st January, 1956. Appeals are provided for to the local authority and to the Minister on the ground of hardship, and houses owner-occupied in whole or in part at the date for acquisition, as well as houses owned and managed by housing associations, will be excluded. Tenants of dwellings acquired by the local authority will be given a measure of rent control and security of tenure if the proposals become law. There is also provision in the plan for increased loan facilities for home ownership and the opportunity for a lessee to purchase the freehold at the end of his lease.

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Many landlords will prefer the proposals to their present inequitable position, subject to some further definition of "fair compensation." They may well wonder, however, whether local authorities will willingly undertake the mainly unprofitable burdens of mass ownership.

Legal Simplicity

THE main theme of Mr. GEOFFREY D. BLAKE in his presidential address on 27th June at the annual general meeting of the Chartered Auctioneers' and Estate Agents' Institute was a plea for simplicity—"Simple principles based on fairness—simple law that people can understand." "Let us have," he said, "clean straightforward laws that can be printed in simple language." Lawyers, too, would like that ideal to be attainable, but memories of the Workmen's Compensation Acts, drafted with the intention of producing "simple law that people can understand," and the dozens of volumes of Court of Appeal reports interpreting it, make us wonder whether simple law can be created so easily. Nineteenth century statutes like the Bills of Exchange Act, 1882, the Sale of Goods Act, 1893, and the Partnership Act, 1890, were excellent only because principles had already been thrashed out in cases. Yet there is much to be said in favour of Mr. Blake's view, and he said it all with great ability. Complicated statutes dealing with housing and planning—there are fifteen Rent Acts and about forty Housing Acts and Town Planning Acts partly or wholly in force—waste manpower and defeat their own object. With regard to the Rent Acts he argued that they should be torn up, and that security of tenure be accorded where necessary in some simple way at rents bearing a reasonable relation to the real rental value of the dwellings and their cost of upkeep. He quoted Swift's remark that laws are like cobwebs that catch the gentle flies and let the wasps and hornets through, and said: "A state of affairs which tends to make ownership of such property practicable only to those who apply most of their energies to dodging their legal and moral obligations cannot be other than bad public policy." We must certainly beware of over-simplification but, at the other extreme, great injustice has resulted from over-complication, for, as Mr. Blake said, a social necessity is being subsidised at the expense of a small part of the public.

The New Valuation Lists Analysed

A COUNTY by county analysis of the new rateable values classified according to the type of property was published on 20th June, as a supplement to the Ministry of Housing and Local Government's annual publication "Rates and Rateable Values in England and Wales." (H.M. Stationery Office, 3s., supplement 3s.) Properties have been divided into ten main groups—domestic (separating agricultural houses, and sub-dividing other houses and flats into groups according to rateable values), commercial (sub-divided into shops and other commercial property), licensed premises, entertainment and recreational, public utility, educational and cultural, miscellaneous, Crown property, industrial, and freight transport. The tables give separate figures for each county, county borough, and metropolitan borough. The county figures are sub-divided by type of authority (non-county borough, urban district and rural district). Summary tables show that at the end of 1955, when the lists were deposited, there were 12,925,222 separately rated houses and flats in England and Wales, and the largest number of them, 3,039,096, is in the group assessed at between £18 and £25. There were 2,249,916 assessed at £10 or under and 75,146 assessed at over £100.

A Marked Man

AN enjoyable ceremony took place recently when the PRESIDENT of The Law Society reached over the gulf of years and experience to present the PRESIDENT of the Solicitors' Articled Clerks Society with a Badge of Office. The occasion was marked by a party at The Law Society's Hall and the badge, bearing an Ass Rampant and the motto, "By Their Deeds Shall Ye Know Them," duly hung round the neck of the junior of the two Presidents. The outstanding feature of the event was the admirable brevity and simplicity of the speeches. The many articled clerks who were present, and who have only a vague comprehension of what they are facing as the years unroll, would do well to model their public utterances on what they heard at this investiture.

Central Land Board Report, 1955-56

THE report of the Central Land Board for the financial year ended 31st March, 1956 (H.M. Stationery Office, price 1s. 3d. net), records that by the end of the year, the number of applications for payments under Pt. I of the Town and Country Planning Act, 1954, reached 112,602 and the payments made by the Board to 54,799 applicants totalled £49,687,000 including gross interest. By 31st March, 84,857 applications, 75 per cent. of the number lodged, had been finally disposed of. The largest number of payments, 21,230, were for land compulsorily acquired or sold to public authorities by agreement, totalling £31,757,431. Other large sums were £12,636,149 in the private sale of land (14,943 applications) and £4,287,805 in development charges paid by claimholders or predecessors in title. In England and Wales 294 appeals against the Board's determinations were made to the Lands Tribunal during the year. The number of determinations issued was 47,156. In the year, 3,538 certificates of the unexpended balance of established development value were issued under s. 48 (1) of the 1954 Act and 216 certificates were issued under s. 48 (2) to public authorities acquiring land under compulsory purchase powers. The work of collecting development charges on development begun before 18th November, 1952, continued during the financial year. The amount received in cash was £353,747 in 241 cases. From the commencement of the 1947 Act (1st July, 1948) until 31st March, 1956, the total amount received in cash or set off against claims was £25,583,236 in 104,129 cases.

The Judicial Committee

IN a short adjournment debate in the Commons on 29th June, Mr. GRAHAM PAGE drew attention to the composition of the boards hearing appeals to the Judicial Committee of the Privy Council. He urged that Dominion or colonial judges who are qualified to sit as Privy Councillors should more often be nominated as members of the board to hear appeals, thus making it a truly Commonwealth appeal court. Unless this was done, he felt that the trend to abandon this judicial link would continue. In reply, the ATTORNEY-GENERAL indicated that the difficulties were practical ones, particularly that of securing continuity of work where the composition of the court was continually changing.

ILLEGALITY OF PURPOSE IN CONTRACT

MANY problems arise where two parties make a contract which, on the face of it, is apparently legal, but which is intended to serve an illegal purpose. The first point to ascertain is whether both parties know of the illegal purpose, for if one is ignorant he has certain rights, whereas if both know of the illegality they are in no better position than if the contract was plainly illegal. This would seem to be true even where the contract is in fact performed legally, because it was said in *Waugh* v. *Morris* (1873), L.R. 8 Q.B. 202, that the parties who perform legally a contract which envisaged an illegal act have rights of enforcement if they did not intend to break the law; but that case is not conclusive since the contract contravened a statutory regulation, and so must be deemed to have been patently illegal.

Both parties knowing of illegality

Two recent cases illustrate the difference between the position where both parties know of the illegality and the position where one only knows. In *Regazzoni* v. *K. C. Sethia* (1944), *Ltd.* [1956] 3 W.L.R. 79; *ante*, p. 417, there was a contract for the sale and purchase of a large quantity of jute bags, the vendor being an English company and the purchaser a Swiss national. The bags were to be shipped to a European port. It was agreed that the contract was governed by English law.

On the face of it this was a valid innocent purchase of goods. But both parties knew that the English supplier had close connections with an Indian firm of a similar name and that the jute bags were to come from India; and they also knew that, in contravention of an Indian law (passed for political purposes) the bags were eventually destined for South Africa. Hence the contract had an illegal purpose, subject to the point whether the Indian law was a law which we would recognise as affecting this contract with illegality in the light of both parties' knowledge.

Much was made of the oft-quoted statement of Lord Mansfield in *Holman* v. *Johnson* (1775), Cowp. 341, that "no country ever takes notice of the revenue laws of another" and it was contended that this principle applies to penal laws and should apply to political laws. Denning, L.J., expressed the view that Lord Mansfield's statement goes too far in saying that the courts will *take no notice* of such laws. They will not enforce the revenue laws or the criminal laws of another country at the suit of that country either directly or indirectly, since these courts do not sit to collect taxes for another country nor to inflict punishments for it (even between countries of the Commonwealth: *Government of India* v. *Taylor* [1955] A.C. 491). But his lordship said that we should take notice of the laws of a friendly country even if they are revenue laws, or penal laws, or political laws, however they may be described, at least to this extent, that if two people knowingly agree together to break the laws of a friendly country or to procure someone else to break them then they cannot ask these courts to give their aid to the enforcement of their agreement. Concurring views were expressed by the other members of the Court of Appeal, and the plaintiff's appeal against the dismissal of his action by Sellers, J., was therefore dismissed.

Plaintiff knowing of illegality

Another case this year, on slightly different lines, is *Clifford* v. *Garth* [1956] 1 W.L.R. 570; *ante*, p. 379. Plaintiff was a builder who agreed to effect certain repairs to premises, but the condition of the premises was such that no estimate could be given and no price was fixed beforehand; instead, the work was to be done on a "cost plus" basis. At the time of the performance of the contract it was necessary to have a licence for work above the cost of £1,000. The work eventually cost £1,900 but no licence was obtained. We cannot assert that both parties knew the contract to be illegal, because, although both parties must be deemed to know the regulations, we do not know whether the defendant knew that the cost of the work as it proceeded went beyond the £1,000 limit. In a case like this it is not necessary to go into that because the plaintiff is himself the guilty party and illegality bars him from recovering in full. But even as regards the builder, in view of the fact that the price was not settled, there was no illegality in doing work up to the value of £1,000. Hence the court allowed him to recover £1,000 but no more. Had there been a fixed price contract for, say, £1,500 he would have recovered nothing because the contract from the beginning would have envisaged an illegality in the absence of a licence.

Plaintiff innocent of knowledge of illegality

A case at the end of last year shows the position where the contract is apparently innocent, and, unknown to one party, it is intended to serve an illegal purpose. In *Strongman* (1945), *Ltd.* v. *Sincock* [1955] 3 W.L.R. 360; 99 SOL. J. 540, a builder agreed to do work for a customer who was himself an architect. Now on the question of getting licences it is usual for a builder to leave this to the architect where one is employed, but it would be no defence in the ordinary case to leave the getting of licences to one's customer. Here, the customer being his own architect, it was held that the architect impliedly warranted that what was being done to his orders was licensed, and so, although the innocent builder could not recover on the contract itself, because the necessary licences not having been obtained it was illegal, he could recover damages for breach of the warranty.

An earlier case contrasted

This case recalls the much earlier case of *Re Mahmoud & Ispahani* [1921] 2 K.B. 716, where a supplier of goods requiring a licence inquired of the customer whether the customer had a licence and was falsely told that he had. In an action for damages for refusing delivery the court gave judgment for the defendant on the ground that an action for damages for breach of an illegal contract would not lie, but they hinted that some other form of action, in this case possibly an action in deceit, might have been successful.

Breach of promise of marriage compared

The above comparatively simple pattern of the types of case which arise is broken into somewhat by the decision of the Court of Appeal in *Shaw* v. *Shaw* [1954] 3 W.L.R. 265; 98 SOL. J. 509. That was a completely different claim, viz., for breach of promise of marriage. The plaintiff had, fifteen years earlier, been through a ceremony of marriage with a man who on his death was found to have been married to another woman at the time of the plaintiff's and deceased's ceremony, in consequence of which the plaintiff was not his widow and had no claim to his estate. The real wife had died a few years before the man, so that a legal ceremony would have been possible, though it was not known whether the deceased man had learned of his real wife's death. Here

again the difficulty that the promise of marriage on which the plaintiff was suing was illegal was met by the implying of a warranty of legality. The Court of Appeal said that every day of their "married" life the man warrants that the ceremony was legal and that the parties are married. Being a continuing warranty it overcomes the difficulty which the Limitation Act might present, and being a separate warranty it overcomes the difficulty of the legality of the promise. So far the pattern is not broken.

Nevertheless, in *Shaw* v. *Shaw* the court also states that the action could be founded on the promise, even though it was an illegal promise, for this reason: that the plaintiff was innocent of any illegal intent. This line of thought is not novel. For example, a hundred years ago in *Clay* v. *Yates* (1856), 1 H. & N. 73, a printer recovered a *quantum meruit* for work done on a contract which, unknown to him, had an illegal purpose. The action would appear to be quasi-contractual rather than on the contract, so that this perhaps distinguishes it from *Re Mahmoud & Ispahani*, *supra*. The claim for damages which *Shaw* v. *Shaw* considered as another ground of the claim was a claim for the breach of promise which arose after the death of the first wife when a legal ceremony with the plaintiff would have been possible. The court did not deal with the question what would have been the rights of the plaintiff for breach of contract if the first wife had survived the deceased, but if innocence of intent is the validation of the claim this ought not to have made any difference. However, the implied warranty solves this difficulty.

Conclusion

Summing up, we may say that (1) if both parties know the contract to be illegal no action lies; (2) if the plaintiff knows it to be illegal his claim will fail whether the defendant knew or not; (3) if only one party had an illegal intent the other may recover a *quantum meruit* for what work he may have done either in quasi-contract or on an implied warranty; and he may also recover damages for breach of an implied warranty where applicable. But, if *Re Mahmoud & Ispahani* is correct and of general application, the innocent party cannot recover for damages for breach of the contract itself.

L. W. M.

THE COURT OF PROTECTION—II

In the first of these two articles, a brief description was given of the Court of Protection and of the classes of persons subject to the jurisdiction of the Master in Lunacy. Mention was also made of the appointment of a receiver and of the circumstances in which he would be discharged.

The form of the order appointing a receiver will now be considered in some detail, thus indicating the powers and duties conferred upon him by the Master and the variety of the matters which fall to be dealt with by the court.

The first part of the order deals with the appointment of the receiver as "Receiver of the income of the Patient with such additional powers only as may be expressly conferred upon him by the following paragraphs of this Order or by the terms of any subsequent Order or Authority issued under the seal of the Master."

Directions are then given for the maintenance of the patient. Nowadays, the majority of patients are maintained free of charge in mental hospitals under the provisions of the National Health Service Act, 1946. In such cases, the Master's primary concern is to ensure that an adequate allowance is made for the patient to receive all that he can appreciate in the way of extra comforts, pocket-money and clothing. There are many patients, however, whose means permit of their being maintained as private patients in hospitals and nursing homes, or in their own homes. If the medical evidence before the court shows that the patient can benefit by such treatment, the order provides an adequate allowance for the purpose, if necessary authorising recourse to capital. Some elderly patients are in residential accommodation provided by local authorities under the National Assistance Act, 1948, and the order normally authorises an allowance to cover the fees payable to the local authority in accordance with the terms of that Act.

The same paragraph of the order contains such allowances as may be authorised by the Master for the patient's dependants or even for other persons whose claim to receive an allowance can be justified. The granting of such allowances is subject to there being sufficient funds after provision has been made for the patient's own needs and his debts.

A paragraph follows authorising the receiver to receive all income to which the patient is or may become entitled and, in many cases, to receive cash items, such as sums standing to the patient's credit on bank accounts, etc. If the patient owns house property, this paragraph authorises the receiver to receive the rents, to pay all outgoings and, if the Master so directs, to let the property furnished or, if the circumstances justify, unfurnished, for periods not exceeding three years. In deciding whether the patient's former residence should be let, the Master is largely guided by the medical evidence as to the patient's prospects of recovery.

Next comes a paragraph providing the receiver with funds to meet the patient's immediate requirements and giving directions for the payment of debts, utilising any sums specified in the previous paragraph. Provided that adequate provision can be made for the patient's needs, the Master will direct payment of all undisputed debts, it being the duty of the solicitor to advise on the merits of any doubtful claim. Where the patient's means are insufficient to meet the claims of his creditors, the Master has power to authorise a compromise and, if this is considered desirable, the solicitor should submit specific proposals.

The order continues with such provisions as the patient's estate and his circumstances require. By virtue of the inherent jurisdiction derived from the Royal Prerogative, the powers of management and administration referred to in Pt. IV of the Lunacy Act, 1890, and the specific powers granted by various statutes, the range of things which the receiver can be authorised to do is wide and the following list is by no means exhaustive:—

(1) Sell the patient's house or land.
(2) Sell or store his furniture.
(3) Carry on his trade or business.
(4) Grant or surrender a lease or accept the surrender of a lease.
(5) Perform any contract entered into by the patient prior to his incapacity.
(6) Surrender insurance policies or continue payment of premiums.

(7) Deal with matters affecting the patient's investments, e.g., redemptions, conversions, allotments of additional shares.

(8) Apply for a grant of administration *durante dementia*.

(9) Commence or defend proceedings on the patient's behalf.

(10) Borrow or lend on mortgage.

(11) Purchase land or house property.

(12) Exercise the powers of the patient as tenant for life.

It should be noted that, before giving directions on the above or other matters within his jurisdiction, the Master requires full information and advice to be furnished by the solicitor. Where the need for the Master's directions arises after the first order has been entered, a formal application must be issued if a further order is clearly required, otherwise a statement of facts should be filed asking for an authority to be issued under the seal of the Master or, in minor matters, for a direction by letter. For detailed information on the procedure reference must be made to the practice books.

The order proceeds with directions for the receiver to account to the Master. The accounts are usually required to be rendered annually, commencing with the anniversary date of the order, and to show all sums received and payments made by the receiver in the course of the accounting period. The passing of the receiver's accounts is taken as an opportunity for a full review of the patient's estate.

Next follow such directions as may be requisite for the safe custody of the patient's will, his deeds, jewellery, securities or other valuables. Such items are normally deposited at the bank where the receiver has arranged to keep his receivership banking account and are held subject to the directions of the Master, the bank giving an undertaking not to release them except on receipt of directions under the seal of the Master. The will may, if desired, remain in the custody of the solicitor who prepared it and a similar undertaking to that given by a bank is filed.

Where the Master directs the lodgment in court of any cash or investments, a paragraph referring to the lodgment and payment schedule to the order follows, the details of the items to be lodged and of the investments and payments to be made by the Accountant-General being set out in the schedule. Any cash which is not required for the patient's immediate needs or his debts is normally invested in a Government stock and the interest is either paid to the receiver or accumulated and from time to time invested. If it is desirable to preserve the identity of any cash or security which is to be lodged in court, the order will provide for the lodgment to be to a special credit, e.g., *A.B.* 1956 No. 2000 Account "Freehold Property Blackacre" (see Lunacy Act, 1890, s. 123, and Lunacy Act, 1922, s. 8).

The next paragraph either directs the taxation of the reasonable proper costs of, incident to and consequent upon the application or, in straightforward cases, states the amount at which they have been provisionally assessed. Directions indicating the method of payment are also included. The costs are taxed by the taxing officer of the Court of Protection and the Rules of the Supreme Court regarding costs are, in the main, applicable.

If the Master has exercised his power of remitting or postponing collection of the court's fees, a paragraph dealing with this will be included; otherwise, the fees payable are as set out in the Management of Patients' Estates Rules, 1934, rr. 148 to 160, as varied by the Management of Patients' Estates (Percentage and Fees) Rules, 1953. The fees include £3 payable on the entering of the order and an annual percentage charge on the patient's clear annual income. The rate is 4 per cent. where the annual income exceeds £150 and 3 per cent. where it does not exceed £150 but is over £100. A fee of £1 is levied where the income does not exceed £100.

So far, the jurisdiction of the Master has been considered with regard to the patient's own property, the care of which is the main function of the court. This brief account of the Court of Protection would not be complete, however, without mentioning the jurisdiction of the Master to authorise the exercise of a power vested in a patient in the character of a trustee (Lunacy Act, 1890, s. 128) and to make orders in certain circumstances in relation to patients who are trustees (Trustee Act, 1925, s. 54). By virtue of these two provisions, the court is often called upon to assist in the appointment of new trustees where the power to appoint them is vested in the patient or the patient is himself a trustee.

In conclusion, it must be emphasised that in the space available for these two articles it has been possible to describe the Court of Protection and its procedure in only the briefest outline, and the practitioner without previous experience of the court will find it necessary to consult the practice books if he is to fulfil adequately his duty to the patient and the receiver.

H. F. C. & R. W.

INLAND REVENUE OFFICES

As from 1st July, 1956, the following arrangements have effect in the Inland Revenue Department on Saturday mornings. These may be subject to adjustment at some later date.

(1) Of the major offices of the Department in England and Wales, there will not be open for public business:—

(*a*) The offices in Somerset House (of the Board and their Secretariat, of the Solicitor of Inland Revenue, of the Chief Inspector of Taxes and of the Chief Valuer), except the Enquiry Room.

(*b*) The Estate Duty Office, Minford House, Rockley Road, W.14.

(*c*) The offices of the Clerk to the Special Commissioners and Inspector of Foreign Dividends, Lynwood Road, Thames Ditton; Turnstile House, Holborn; Kingston By-Pass and City Gate House.

(*d*) The Assessments Division, Barrington Road, Worthing, and Bush House.

(2) In Scotland, the Headquarters offices in Waterloo Place, Edinburgh (of the Comptroller of Stamps and Taxes, of the Solicitor of Inland Revenue and of the Estate Duty Office), will not be open for public business except for the Stamps office (see para. (4)). The Chief Valuer's Office (including local offices) will be closed.

(3) The local offices throughout the United Kingdom of H.M. Inspectors and Collectors of Taxes and those of the District Valuers and of Valuation Officers in England and Wales will remain open, with reduced staffs, to attend to members of the public. (A number of these may later be closed in the absence of any considerable demand from the public.)

(4) A public Deed Marking and Stamping Room will be open in Bush House, London, and Waterloo Place, Edinburgh. The Stamps offices in the City of London and the provincial offices, other than that in Manchester, will be closed.

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EVIDENCE OF DANGEROUS DRIVING

IT is proposed to consider in this article some cases as to the admissibility of evidence on charges of dangerous driving. The Road Traffic Act, 1930, s. 11 (1), itself makes a good many matters admissible, for it reads:—

> "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable (to penalties)."

Section 45 of the same Act provides that failure to comply with the Highway Code may be relied upon in any proceedings, civil or criminal, as tending to establish liability and, similarly, observance of the Code may negative liability. Earlier provisions in the Light Locomotives on Highways Order, 1896, and in the Motor Car Act, 1903, had made mention of "traffic on the road" and "all the circumstances of the case," and there are a few cases on these provisions which can be found, if the reader is interested, in the "English and Empire Digest," vol. 42, Street and Aerial Traffic, pp. 872–3. The comprehensive wording of s. 11 (1), *supra*, now includes the wording of the older provisions and gives effect to the decisions thereon; there have, however, been some decisions on s. 11 itself.

The first to be mentioned in this article were appeals by the prosecutor by case stated against the dismissal by magistrates of charges under s. 11. Normally, there is no appeal to the High Court against a dismissal of a charge by magistrates on the facts, but if their decision is one to which, on the evidence before them, no reasonable magistrates, giving themselves proper directions and applying the proper considerations, could come, then the High Court may interfere (*Bracegirdle* v. *Oxley* [1947] K.B. 349). As will be seen, in several cases the High Court have overruled the magistrates' decisions to dismiss charges under s. 11 but normally, if there was evidence on which they could come to the decision which they have reached, the High Court will not interfere. And it is only in exceptional cases that the High Court will reverse a dismissal by magistrates of a charge of careless driving under s. 12 of the Road Traffic Act, 1930 (*Gibbons* v. *Kahl* [1955] 3 W.L.R. 596; 99 SOL. J. 782; *Thompson* v. *Wigley* (1956), *The Times*, 13th January).

Driving at a dangerous speed

The first of the cases under s. 11 was *Kingman* v. *Seager* [1938] 1 K.B. 397, a charge of driving at a dangerous speed. The defendant was driving a vehicle with a laden weight of 15 tons along a main road normally carrying a heavy volume of traffic. He passed over a cross-roads and negotiated a bend at a speed of 33 to 36 m.p.h., and at one time accelerated to 40 m.p.h., i.e., double his permitted speed. Lord Hewart, C.J., said that it was not open to the justices to say that in those circumstances there was no danger to traffic which might reasonably be expected to be on the road even if none had in fact been endangered. Humphreys, J., added that, where the speed at which the vehicle had been driven was in itself a dangerous speed—and in his view the fact that it was double the lawful speed showed that it was—no other circumstances need be taken into account. In *Durnell* v. *Scott* [1939] 1 All E.R. 183, the defendant's van, the lawful speed of which was 30 m.p.h., had been driven at speeds varying between 35 and 50 m.p.h. for three miles along the Manchester to London road. It carried 30 cwt. of furniture and passed five converging roads and ten bends. The High Court directed a conviction, but it is not clear from the report whether the charge was driving recklessly or at a dangerous speed. However, the facts clearly showed, it is submitted, both offences. In *Bracegirdle* v. *Oxley*, *supra*, the defendant had driven a lorry with a laden weight of some 14 tons along the same main road for a mile, passing a converging road, five farm entrances and a bend, going over a narrow bridge and overtaking without a signal on a bend. His speed had been between 40 and 45 m.p.h. The charge was driving at a dangerous speed and the magistrates had said that there was nothing to distinguish this case from an ordinary case of exceeding the speed limit. A divisional court of five judges emphatically disagreed and sent the case back to the magistrates with a direction to convict under s. 11. It was pointed out, however, that, although the speed on the road in question was dangerous, a high speed on a straight open road across Dartmoor, with a long view ahead and no other traffic about, would not necessarily be a dangerous speed. It appears from the judgment of Lord Goddard, C.J., that two other decisions of magistrates dismissing charges under s. 11 had, in July, 1946, been sent back to them with instructions to convict. The most recent case is *Baker* v. *Williams* (1956), *The Times*, 27th January. The defendant, who was charged with driving at a dangerous speed, had ridden a motor-cycle along a main road at 64 m.p.h., when the traffic was heavy; he overtook a car which was itself overtaking a moving bus, going 6 feet over the white line in the centre of the carriageway. The magistrates had dismissed the charge but the divisional court, by a majority, sent it back to them. Stable, J., in dissenting, said that the decision of the magistrates was on a question of fact and he did not think that the High Court should interfere. Another case under s. 11 in which the High Court reversed the magistrates' decision was *Marson* v. *Thompson* (1955), *The Times*, 8th March, where the defendant had overtaken and "cut in" in a dangerous way.

Several of these cases refer, as does s. 11 (1) itself, to the traffic which might reasonably be expected to be on the road. In *Parson* v. *Tomlin* (1956), 120 J.P. 129, evidence by a police officer, on a charge under s. 11, giving his estimate of the number of vehicles passing along a certain road per hour on the day of the accident and giving also the number which actually went along the same stretch of road on a later day, was held to be relevant to the question as to what traffic might reasonably have been expected to be on the road at the time of the accident. In an earlier case (*Elves* v. *Hopkins* [1906] 2 K.B. 1), evidence as to the amount of traffic normally to be expected to be in The Promenade, Cheltenham, at 4 p.m. had been held to be admissible as being part of "all the circumstances of the case," words used in the Motor Car Act, 1903, s. 1. The "very fast speed" at which the defendant had driven was agreed by all the witnesses to be in excess of 20 m.p.h., though no one estimated it as higher than 25 m.p.h.

Driving in a dangerous manner

Where the charge is driving in a dangerous manner, evidence of the speed at which the vehicle was driven is admissible, for speed is an element of danger (*Hargreaves* v. *Baldwin* (1905), 69 J.P. 397; *Beresford* v. *Richardson* [1921] 1 K.B.

243). On the other hand, where the charge is driving at a dangerous speed, it has been held in Scotland that evidence of speed only should be given and not evidence of "jumping" traffic lights and cutting-in (*Galloway* v. *Adair* [1947] S.C. (J.) 7). It is doubtful if so narrow a rule would be applied by the Queen's Bench Division; indeed, evidence of overtaking on a bend and not giving signals was admitted without question in *Bracegirdle* v. *Oxley*, *supra*, and in *Baker* v. *Williams*, *supra*, evidence of overtaking on the offside was also admitted. Nevertheless, it has been known for *Galloway* v. *Adair*, *supra*, to be quoted in an English magistrates' court and prosecutors might feel it wise to charge driving in a dangerous manner in most cases.

Evidence of the manner of driving five miles from the scene of the accident was held admissible in *R.* v. *Taylor* (1927), 20 Cr. App. R. 71, and in *R.* v. *Burden* (1927), 20 Cr. App. R. 80 (where the charge was driving under the influence of drink) evidence of the defendant's zig-zag course three miles from the scene of the accident was admitted. In *Hallett* v. *Warren* (1929), 93 J.P. 225, it was held that, on a charge of driving in a dangerous manner, the evidence of persons who had seen the defendant driving at points between four-fifths of a mile and two miles from the scene of the accident was admissible and it was said that if the defendant was taken by surprise by such evidence he could ask for an adjournment pursuant to (what is now) s. 100 of the Magistrates' Courts Act, 1952. For example, if a driver received a summons alleging reckless driving in Ludgate Hill and, on arrival at the court, found that evidence was given not only of what occurred in that street but also of his manner of driving in Fleet Street and the Strand, he could, if he claimed to have been misled by the mention of Ludgate Hill only and desired to call evidence as to his driving in Fleet Street and the Strand, properly seek an adjournment.

In *R.* v. *Baldessare* (1930), 22 Cr. App. R. 70, a passenger in a car had been convicted of manslaughter and the Court of Criminal Appeal upheld his conviction, saying that there was evidence before the jury that there was a common purpose and that the passenger joined in responsibility for the way the car was driven. The facts were not stated, but one can imagine cases where the driver and passenger demonstrate such a common purpose, e.g., motor bandits making their escape, with the driver trying to force a police car off the road and the passenger throwing things at that car, pushing policemen off the running-board, etc. But the doctrine of joint responsibility does not necessarily apply in every case and would not where there was no evidence that the passenger joined in responsibility for the way the vehicle was driven, even if he was engaged on a criminal purpose (*Webster* v. *Wishart* [1955] S.L.T. 243).

Joinder of other charges

A charge of driving whilst disqualified should not be tried along with a charge of dangerous driving or, *semble*, any other offence, for the fact of disqualification shows that the defendant has been previously convicted (*R.* v. *Pomeroy* (1935), 25 Cr. App. R. 147). Indeed, it might be a ground for asking for an adjournment to a fresh bench if the charge of driving whilst disqualified appeared on the magistrates' sheet, even though it was not read out. Charges of dangerous driving and driving under the influence of drink are, it is believed, often heard together, by consent, but it was said in *R.* v. *Carr* (1932), 23 Cr. App. R. 199, that charges of manslaughter and driving under the influence of drink should not be taken together.

Evidence that defendant has taken drink

Where there is no charge of driving under the influence of drink, may mention be made in a charge under s. 11 that the defendant had taken drink? In the debate on a Road Traffic Bill in the House of Lords on 14th March, 1955, the Lord Chancellor said that cases might occur in which evidence of having taken drink would be very prejudicial and would have evidential value. Judges and benches, he continued, must consider the circumstances of the case and be guided by the rule that they will admit such evidence if they think it relevant and exclude it if they think it to be merely prejudicial. Lord Kilmuir did not mention *R.* v. *Carr*, *supra*. With all respect, it is difficult to see how evidence that the defendant had taken drink can normally have any effect but a prejudicial one in the minds of the jury and the magistrates, for the amount of drink which he can be shown to have taken will invariably be small and unlikely to have affected his driving (for otherwise there should be a charge of driving under the influence of drink). It is also difficult to see how it can be of real relevance. Would evidence be thought relevant if it established that the driver had been eating suet pudding and was therefore likely to be sleepy and not on the alert? Or that he had just had a violent quarrel with his beloved and was therefore likely to be nervy and erratic? Or even that he was "spiritually intoxicated" by Tchaikovsky's music (see *ante*, p. 288)? Often the breath will smell of alcohol after a very small consumption and yet the prejudicial effect on the minds of the jury or magistrates of such evidence may be serious. It is submitted that evidence that the defendant had taken drink should, in charges of dangerous or careless driving, be put forward only after very careful consideration and with conclusive arguments to show its relevance.

It was said in *R.* v. *Ward* [1954] Crim. L.R. 940 that the mere fact that a driver is under the influence of drink to such an extent as to be incapable of having proper control of the vehicle does not amount of itself to dangerous driving and that dangerous driving has to be considered objectively in relation to what he is doing with the vehicle.

Some miscellaneous points

It is submitted that the principle of *res ipsa loquitur* will almost never apply to prove a charge under s. 11. In *Alexander* v. *Adair* [1938] S.C. (J.) 28, two cars were found locked in collision at an open cross-roads. Clearly it was highly probable that one of them had been negligent; there was, however, no other evidence and neither driver went into the witness-box. It was held that the conviction of the one who appealed should be quashed, for, however suspicious the circumstances, there must be some evidence that the defendant actually drove in a dangerous way.

In *Simpson* v. *Peat* [1952] 2 Q.B. 24, a case of careless driving, it was said that the fact that the defendant committed an error of judgment did not absolve him from liability. It was added, however, that he should not be found guilty if, when exercising the proper degree of skill and care, he did the wrong thing when suddenly confronted with an emergency through no fault of his own, e.g., he swerved to his right and it is shown that if he had swerved to his left there would have been no accident. One may compare the civil doctrine of the "agony of the collision."

Lastly, a recent case, not widely reported, can be noticed. A defendant drove across a light-controlled cross-roads from south to north. There was no evidence that the lights applicable to him were red, but there was evidence that the

east-west ones were green. On appeal against a conviction for dangerous driving, it was held in *Wells* v. *Woodward* (1956), 54 L.G.R. 142, that the court could legitimately draw the inference that the device was working and that, as the lights were showing green for east-west traffic, they were showing red for north-south traffic. In *Nicholas* v. *Penny* [1950] 2 K.B. 466 it was held that evidence of the readings of a speedometer was admissible without proof that it had been tested, and the court followed earlier decisions upholding the admissibility of evidence of stop-watch readings. In other words, mechanical devices can be presumed (in the absence of contrary evidence) to be working properly.

G. S. W.

A Conveyancer's Diary

A SECOND MORTGAGEE'S REMEDIES

A READER has written saying that in these days of acute financial stringency an article on the position of the second mortgagee and his remedies would be useful. He goes on to say that a client with a large equity over and above his first mortgage is often pained and surprised when he is told that it is most difficult and generally impossible to arrange a second mortgage for him.

I am afraid that the difficulty is more a financial than a legal one, and that there is little that the lawyer can do to help his client. On paper, that is to say so far as legal remedies are concerned, the position of a second mortgagee is nowadays a strong one. I assume, of course, that the second mortgage will be a legal mortgage by deed, and that the first mortgage will contain no provisions which will bear unduly on a subsequent mortgagee. In saying this I have in mind the sections of the Law of Property Act, 1925, concerning consolidation and tacking. If the right to consolidate is reserved to the first mortgagee despite the provisions of s. 93, a subsequent mortgagee may find his position prejudiced if the prior mortgagee seeks to foreclose and the subsequent mortgagee, to protect his position, finds it necessary to "redeem up." Foreclosure is not a very popular remedy nowadays with incumbrancers, doubtless because the proceedings are protracted, and relatively complicated, compared with the remedy of sale after possession has been obtained. But in advising a potential second mortgagee whether to lend money, for which there are at present so many attractive outlets, on a particular security it is possibilities, not probabilities only, which one has to take into account; and the remedy of foreclosure may be exercised by a prior incumbrancer, and its exercise may therefore put a subsequent incumbrancer under the necessity of redeeming. If that necessity should arise, it is important to know from the outset of the transaction exactly what the liability to redeem will amount to.

Prior incumbrancer's right to consolidate, etc.

Of course, there is the power of the court under s. 91 (2) of the Law of Property Act, 1925, in any action for, *inter alia*, foreclosure, on the request of, *inter alios*, any person interested in the right of redemption, to direct a sale of the property; and this provision may be invoked by a subsequent incumbrancer who, after foreclosure proceedings have been started by the prior incumbrancer, finds it inconvenient or impossible to raise the money to redeem the prior incumbrance (and any other incumbrances which the prior incumbrancer may be entitled to have redeemed at the same time). If the property is of sufficient value, everybody will be paid out of the proceeds of sale. But I regard s. 91 as a *tabula in naufragio* for any incumbrancer. Although the language of the section is very wide, the provisions of earlier legislation which it reproduces were construed rather restrictively by the court. Applications under the section are, in my experience at any rate, rare and it is difficult to advise what the practice of the courts under it is. Moreover, it is no protection against a claim to consolidate other incumbrances with that in relation to which the application would be made. It should then, I think, be a prime requisite of any proposal to borrow money on second mortgage that the first mortgagee has no right to consolidate; and the same thing goes for the right to tack further advances.

Sale by prior incumbrancer

If the extent of the first mortgagee's rights is known and appreciated from the outset, the position of a second mortgagee of the same property should be sound. If the mortgagor defaults in his obligations under the first mortgage and the first mortgagor claims to enforce them, the remedy that he will usually seek will be that of sale, by way of exercise of the statutory power of sale after, if necessary, obtaining possession of the property to enable a sale with vacant possession to take place. Such a sale will have the effect of extinguishing the second mortgage in favour of the purchaser, but the net proceeds of sale of the property after payment thereout of all moneys due under the first mortgage will then be held by the first mortgagee on trust for any subsequent mortgagee. Registration of his mortgage by a second mortgagee as a land charge (which will, of course, have been effected immediately after the creation of the mortgage) gives notice of the mortgage for this purpose to the prior mortgagee, who would thus be liable to a subsequent incumbrancer to the extent of the latter's charge if he were to pay the surplus to the mortgagor. (I say "for this purpose" here, because registration of a subsequent mortgage does not always constitute notice to a prior mortgagee. It is the duty of a mortgagee, after his charge has been satisfied, to hand the title deeds to the person who has the best right to them—that is, the mortgagor if there is only one incumbrance, or the next incumbrancer if there is more than one incumbrance. But the prior incumbrancer is under a duty to hand the deeds to a subsequent incumbrancer only if he has actual notice of that incumbrance, and for this purpose registration does not constitute notice: this is the effect of the amendment of s. 96 of the Law of Property Act, 1925, by the Amendment Act of 1926.)

Provided, therefore, that a second mortgagee takes the precaution of giving express notice of his mortgage to the first mortgagee, he should have nothing to fear from a sale of the property by the first mortgagee under the statutory power of sale, except such a fall in the value of the property as renders the proceeds of sale insufficient to discharge both incumbrances. But that is a risk to which all securities, whatever their priority, are subject, and it is in any case not one with which the lawyer is, as such, primarily concerned.

Sale by second mortgagee

The statutory power of sale is exercisable equally by a subsequent incumbrancer. If no arrangement is made between the various incumbrancers for the discharge of their respective charges, the conveyance by the subsequent incumbrancer will take effect subject to the earlier incumbrance (s. 104 (1) of the Law of Property Act, 1925). If the prior mortgagee is content to continue with his mortgage, the sale of the property will in existing circumstances be almost certainly greatly facilitated. From this point of view the existence of a prior charge may be a great advantage to a second mortgagee. But in practice sales by second or subsequent mortgagees in exercise of the statutory power are rare : if the default which gives rise to the exercise of this power occurs, it usually occurs in relation to all the existing charges at the same, or more or less the same, time. But at law the power exists and so, for what it is worth (which, in practice, is not very much), does the power of a second mortgagee to foreclose. The exercise of that power would leave the second mortgagee with the property still subject to the first mortgage, but as in the case of a sale by a second mortgagee this situation (if it should in practice ever arise) is more likely to be advantageous to him than not.

Receiver appointed by second mortgagee

Short of the powers of sale and foreclosure, which are the extreme remedies of a mortgagee, a second mortgagee has the remedies of going into possession of the property (if necessary with the assistance of the court), and of appointing a receiver of the income of the property. The income received by a receiver must be applied in keeping down all payments having priority to the mortgage in right whereof the receiver was appointed before payment of interest accruing due in respect of the principal money due under the mortgage (Law of Property Act, 1925, s. 109 (8)), and provided that the receiver discharges this duty it is unlikely that the first mortgagee will object to the appointment. Conversely, a receiver appointed by the prior mortgagee must account to the second mortgagee before he pays any surplus (or indeed has, strictly, any surplus to pay) to the mortgagor. A receiver appointed by a second mortgagee is in general superseded by the appointment of a receiver by the first mortgagee ; but a receiver appointed by the court may none the less have superior powers to those of a receiver appointed under the statutory power (*Re Metropolitan Amalgamated Estates, Ltd.* [1912] 2 Ch. 497).

This is a very bare outline of the powers and remedies available to a second mortgagee whose mortgage is a legal mortgage by deed. Such a mortgagee is adequately protected by the law, provided that the obligations of the mortgagor under the prior mortgage are not unusual. It is not therefore the state of the law which inhibits the creation of more second mortgages at the present time. It is the money market. And over that we have no control at all.

Trust holdings in private companies

In an article under the heading " Trust Holdings in Private Companies," which appeared a few weeks ago in this Diary (see p. 427, *ante*), I contrasted the large number of precedents available to assist the draftsman in providing for the continued running of a testator's absolutely owned business with the lack of precedents for provisions disposing of a block of shares in a private company—the two being often for practical as distinct from legal purposes identical items of property. The contributor who signs his lively comments on the day-to-day affairs of a busy office as seen from the inside, " Escrow," has drawn my attention to a useful form designed to meet the difficulty which prompted my article. It is to be found in the *Conveyancer* (vol. 20, No. 2, at p. 680).

" A B C "

Landlord and Tenant Notebook

HOUSING REPAIRS AND RENTS ACT, 1954: EFFECT OF CERTIFICATE

London Hospital Governors v. *Jacobs* [1956] 1 W.L.R. 662 (C.A.) ; *ante*, p. 434, decided that a tenant who has been served with a notice of increase under Pt. II of the Housing Repairs and Rents Act, 1954, may challenge the accompanying declaration (and thus the notice) in legal proceedings, though not armed with a certificate issued by the local authority that " either or both " the " conditions justifying an increase " are not fulfilled.

The questions which arose were, as Lord Evershed, M.R., said, of some significance ; and one interesting feature of the case was an unusually striking difference of opinion on the effect of the relevant provisions. The county court judge, who upheld the landlords' contentions (the point being raised in an action for arrears of rent), considered that a contrary result would make a mockery of the scheme ; Lord Evershed, M.R., said that the contentions were hardly tenable.

The scheme

To give even a brief account of the scheme it is necessary to set out much of at least one provision in full. By s. 23 (1), " Where a dwelling-house is let under a controlled tenancy or occupied by a statutory tenant, and the landlord is responsible, wholly or in part, for the repair of the dwelling-house . . . (*a*) if and so long as the following conditions (hereinafter referred to as ' the conditions justifying an increase of rent ') are fulfilled, that is to say—(i) that the dwelling-house is in good repair ; and (ii) that it is reasonably suitable for occupation . . . ; and (*b*) if in accordance with the Second Schedule to this Act the landlord has produced satisfactory evidence that work of repair to the value specified etc. . . . the rent recoverable from the tenant shall be increased etc."

I pause here to observe—as it may, I believe, help to account for the difference of opinion—that the well-meant designation of two conditions as " the conditions justifying an increase of rent " might mislead some people into thinking that those two conditions were the whole of the conditions precedent to a right to increased rent.

Indeed, when one comes later to s. 25 (1) one finds that even fulfilment of the other requirements—control, responsibility for repair, " satisfactory evidence "—will not suffice ; by s. 25 (1), " No sum shall be recoverable by way

of repairs increase unless the landlord has served . . . a notice in the prescribed form (hereinafter referred to as a 'notice of increase') accompanied by (*a*) a declaration in the prescribed form that . . . the conditions justifying an increase of rent were fulfilled; and (*b*) a declaration in the prescribed form such as is mentioned in the Second Schedule." The Schedule, headed "Proof of Past Repairs by Landlord," begins by requiring the declaration to deal with the value of repairs, the time when they were effected, and the ratio of their value to the amount of statutory repairs deduction; then, by para. 3, "Where . . . the landlord is or was responsible in part only for the repair of the dwelling-house, the two foregoing paragraphs shall have effect . . . with the substitution for the values therein mentioned of those values proportionately reduced." Such reduction is, in fact, provided for in s. 23 itself, in a proviso to subs. (*2*), and by subs. (5) it can be agreed or else settled by the county court.

Later, s. 26 (1) entitles a tenant served with a notice of increase to apply to the local authority for a certificate that "either or both of the *conditions justifying an increase* of rent are not fulfilled"; and the local authority, "if satisfied that *the dwelling-house* fails to fulfil either or both of the conditions, shall certify accordingly . . ."; by subs. (2) the landlord may challenge the certificate; by subs. (4), by satisfying the authority that, the necessary work having been done, the conditions are fulfilled, he qualifies for a revocation of the certificate. And the landlord may, by subs. (5), challenge a refusal to revoke.

Responsible in part

In *London Hospital Governors* v. *Jacobs* what had happened was that the landlords had let in the year 1931 a controlled dwelling-house on a weekly tenancy. The agreement was in writing. The tenant, the since deceased husband of the defendant, had agreed "to keep the premises in good and tenantable repair (fair wear and tear excepted) and be responsible for and replace all broken glass and missing keys." It was not disputed that the defendant held under the terms of that tenancy (or, possibly, a variation thereof) as statutory tenant.

In May, 1955, the landlords set about increasing her rent under Pt. II of the Landlord and Tenant Act, 1954. The notice and declaration they served were based on the assumption that they were responsible for all repairs; the proviso to s. 23 (*2*) and para. 3 of Sched. II thus being ignored. The tenant obtained a certificate under s. 26 (1) and later the landlords secured its revocation. The tenant still refused to pay the increase; the action was for arrears, and in their particulars of claim the landlords pleaded, *inter alia*, "the said premises were let by the plaintiffs to *S J* from 16 February, 1931, by an agreement in writing dated 8 May, 1951 . . ." which allegation naturally aroused the curiosity of the tenant's legal advisers. It was accordingly contended on her behalf that the notice was ill-founded. The landlords then took the objection that the point was not open to the defence; s. 26 provided the tenant's remedy, that of a local authority's certificate; and the county court judge upheld the objection.

Ouster of jurisdiction

The Court of Appeal seems to have taken the line that they were dealing with an attempt to oust the jurisdiction of the Queen's courts. Lord Evershed, M.R., pointed out that this could be done by "very clear words"; he instanced the certificate which a local authority may issue under s. 3 (*2*) of the Rent, etc., Restrictions (Amendment) Act, 1933, certifying that it will provide suitable alternative accommodation; the subsection says that such certificate shall be "conclusive evidence," but in the case before him there were no clear words. Jenkins, L.J., said that s. 26 merely purported to give the tenant a cheap and simple method of repelling the landlord's claim; *prima facie*, where an Act provides that if *certain conditions* are fulfilled an increase is to be made in the rent, then in any proceedings to recover the increased rent it is open to the tenant to prove, if he can, that *the conditions* have not been fulfilled; and s. 26 (*2*) did not imply "that if a tenant does not obtain a certificate . . . then he is to be disabled from contending that *the conditions* justifying an increase of rent have not been fulfilled."

Suggested alternative approach

I italicised the words "certain conditions" and "the conditions" in my above quotations from Jenkins, L.J.'s judgment because, in my submission, the result could be achieved without reference to ouster of jurisdiction "by the *ipse dixit* of an official of a local authority acting in a purely administrative capacity" (Lord Evershed, M.R.), without accepting that "the local authority, administrative body, would be given exclusive jurisdiction for the purpose of deciding that *the conditions* have not been fulfilled" (Jenkins, L.J.).

What I respectfully suggest is that the short answer to the landlords' objection could be found in the provisions themselves once one divides the facts constituting the title to an increase into (i) what the Act calls, for the sake no doubt of convenience, "the conditions justifying an increase of rent," and (ii) other requirements and conditions. It is noticeable that while the grammatical subject of s. 23 (1) is "the rent recoverable from the tenant" the subject varies in sub-clauses: it may be "the dwelling-house" and it may be "the landlord." But all that s. 26 is concerned with is "the conditions justifying an increase of rent"; and all that those conditions are concerned with is the state of repair and habitability of the dwelling-house. Consistently with this, para. 5 of the ("Proof of Past Repairs") Sched. II concludes with ". . . subject as aforesaid, the validity of a declaration shall not be questioned *on the ground that* the value of the work of repair stated in the declaration to have been carried out on the dwelling-house is less than that required by the foregoing provisions of this Schedule"; that provision was mentioned by Lord Evershed, M.R., who did not, however, develop an *expressio unius est exclusio alterius* argument from its presence. The "no certificate, no defence" contention of the landlords might, in my submission, if upheld, have even more absurd results than those suggested. One might some day find an unfortunate sanitary inspector suffering from headache after trying to construe a tenancy agreement, or even a will which did not make it crystal clear whether the applicant for revocation of a certificate was the landlord of the applicant for its issue.

Variation of tenancy

Out of fairness to the landlords, I would conclude by mentioning that it appeared that they had in fact carried out the repairs on which they based their claim for increased rent; the county court judge inferred that there had at some time "been a change in the terms of the bargain"; and with this view the Court of Appeal also agreed. The subject is, however, one which merits an article to itself.

R. B.

"IN LONDON TOWN"

UNDER the title "Stay where you are, Whittington!," an article in your last issue compared the taxation of costs before district registrars with taxations before masters of the Supreme Court, and suggested that the latter were a more painful process.

Taxations are always unpopular and the taxing officer—whether district registrar or master—always seems too generous when one is acting for a paying party in an action, but incredibly mean when one is acting for a successful party. It is surely a question of approach. Indeed, I apprehend that if both parties go out from a taxation equally dissatisfied—as is often the case—the taxation has probably been most fair.

When we criticise the alleged meanness of taxing officers we are apt to forget that the chief function of a taxation is to prevent the unsuccessful party from having his bones picked clean by an over-zealous and extravagant successful party. There is also the question (particularly in a solicitor and client taxation) of protecting the client from unreasonable demands by counsels' clerks—which demands are, these days, not always resolutely resisted by solicitors when briefs are marked and delivered.

But do solicitors receive a fairer deal from the district registrars in the country than from masters in London? Most solicitors will doubt this—if they stop to think.

Although I am not for a moment suggesting that district registrars are not both competent lawyers and fair in their methods, the taxation procedure in the district registries is much inferior to the High Court procedure in the Taxing Office in London.

(1) A number of district registrars are local solicitors and are only part-time officials. Taxation of costs is only one of their many duties and few are experts in the by no means simple field of "costs."

(2) Most district registrars have little or no assistance given to them from their staff on taxations, and it is difficult for them to tackle complicated bills which are often supported by a mass of papers.

(3) There is no "ballot" for a master as there is in the High Court, and solicitors must accept the local district registrar who, being only human, may have very strong prejudices.

(4) There is no real co-ordination of policy between district registrars, which must make for many variations in decisions in different parts of the country.

On the other hand, taxations in London ensure—

(*a*) the protection and scrupulous fairness of the "ballot for a master";

(*b*) well-trained staff to assist the masters in reading the bill and papers—and the masters themselves are solicitors of great experience of litigious practice. Seldom, I believe, is a taxing master appointed who has less than twenty years' experience in private practice;

(*c*) although each master is in theory a law unto himself, in general, any experienced costs clerk can, in London, prophesy fairly accurately in advance the amount likely to be allowed for the important items of "Instructions for Brief";

(*d*) country solicitors sending their bills to be taxed in London have the invaluable assistance of their London agents who often draw the bills and who have wide knowledge of litigious practice and of costs.

If solicitors examine the facts impartially—and it is very difficult to keep a cool head on the vexed question of costs—they may well come to the conclusion that it would be in the interests of their clients to have the option to have costs taxed by the taxing masters in London.

If that option were given, an amendment of the rules would be required.

A banner may yet be raised reading "What Mugglethorpe taxes to-day, London should tax to-morrow."

BOW BELLS

HERE AND THERE

SPLENDID HALL

THE brilliant recital which Mr. Denis Matthews recently gave in the Inner Temple Hall was the first opportunity for many of us to see it inside. That first sight was a most agreeable surprise, for unlike the Law Courts it is far better inside than out. From the north the side facing the Temple Church has an undistinguished, almost municipal look. From the south, as seen from the gardens, it loses by the long, straight, monotonous, unvaried roof line from Crown Office Row to the new library. Photographs of the interior suggested nothing very much out of the ordinary and one had heard rumours and whispers of a planning slip, only discovered when the work was well advanced, which was said to have made the Hall some sizes smaller than was originally intended. Therefore one entered it totally unprepared for the genuine splendour of the chamber, a complete breakaway from its Gothic predecessor, which had never looked so fine in its entirety as it did as a burnt out ruin. Both in its design and in its glass it was, indeed, as one of the guide books described it, "miserably mean." It was a very bad product of the eighteen seventies. Almost its best feature was a tunnel footway which ran beneath it towards the gardens and which was the delight of children living in the Temple. By contrast the new Hall is all spaciousness and light in the stately eighteenth century manner with round headed windows, a richly elaborate ceiling and a floor of black and white marble squares. The illumination is by a double row of magnificent chandeliers. The windows display the arms of no less than twenty-four Inner Temple Chancellors and Keepers of the Great Seal from Lord Chancellor Audley to Lord Chancellor Simon. In one window on the south side are the arms of James II and George VI, thus strangely associated because as Duke of York each became a member of the Society. In the window at the west end above the gallery is the Pegasus of the Inner Temple and, below it, the arms of Robert Dudley, Earl of Leicester, whose practical patronage of the Society in the reign of the first Elizabeth deserved so well of it that it was ordered that his arms should be set up "as a continual monument." In the Victorian Hall this tribute lapsed. Portraits of former members of the Inn hang all round the walls. Three of the most interesting, placed on either side of the window above the gallery, are recent acquisitions from the Guildhall. They

formed part of the collection of portraits of the judges who adjudicated on the boundary questions arising out of the Great Fire. Life-size, they made an impressive show in the City until the war, when they were damaged by water in the crypt where they were stored for safety. The Corporation having decided to dispose of them rather than undertake the task of restoring them, the Inner Temple acquired three of the judges who had been members. It has now, with some difficulty, traced a fourth, which had got into other hands and will complete and balance the array of the others.

INNS THAT ARE NOT

ONE is glad to see that the United Commercial Travellers' Association is agitating in protest against inns and hotels that are not inns and hotels, houses for drinking only and providing neither bed nor board. It is approaching other organisations to get support for legislation to have hotels classified, so that one could tell at once by the name whether licensed premises provide sleeping accommodation, meals and drink, or meals and drink only, or drink only. They contend that, no matter how large and palatial a house may be, if one cannot get a bed there it is just a pub. The innkeeper's ancient obligation to provide food and lodging for the travellers has become veiled in the mists of obscurity and ambiguity. Certain awkward decisions during the war-time and post-war food shortages seemed to whittle it down so that the lazy or inhospitable innkeeper now runs very little risk of prosecution at the hands of the disappointed traveller, who is generally unwilling to enmesh himself in the uncertainties of the law, probably in some place several counties away from where he lives. One does not meet that sort of trouble abroad, where people who adopt the profession of hospitality practise it, and there is no particular reason why it should be endemic in England. (Note "England," for Scotland has a far better record in this respect.) At the present time there is not the slightest excuse why any house, public or private, should not be able to put before the chance stranger a "fry up" of bacon and eggs and potatoes and a tin of fruit (to put culinary achievement at the level of the lowest common denominator). That in the bar of a country pub would do very nicely, thank you, but how many rise above the cold mass-produced meat pie or a ham sandwich, which the court would almost certainly hold to be a "meal"? Part of the trouble, of course, lies in the English licensing hours which concentrate all the drinking of the day into just those hours when the landlord and his wife and family should be free for the kitchen and the table. Of course, the better the service the better one is pleased, but the benighted traveller is happy to find "pot luck" and a "shake-down," and it's a poor, mean domestic interior where there is nothing in the pot and nowhere to shake down a mattress. The "tied house" with its brewery background has too long run the English inn on the fallacy that by the bottle alone doth man live.

RICHARD ROE.

Country Practice

JOHN SMITH, DECEASED

THE solicitor pushed open the bedroom door, and the three mice looked daggers at him from the bed.

If there is one thing that annoys the ex-naval commander type of reader, it is that modern novelists do tend to start in the middle of a story, have a look at the end and the beginning, and leave off nowhere. Indeed, one indignant reader—possibly not an ex-naval officer—wrote to an editor to say that it was his custom to set about modern novels with a pair of scissors, re-arranging the pages so as to get the story into chronological order.

In practice, even in legal practice, stories do not seem to develop in any logical or chronological order. In a recent probate matter, undoubtedly the three angry mice made the greatest impression upon me, so I have mentioned them first. Three days before, the only thing I knew about John Smith was that he was dead.

He—John Smith—rented a small farm from a client of mine in an out of the way district. He lived by himself; employed nobody; and was unfriendly to the neighbours. However, when the neighbours realised that his cattle were starving, they called at his little farmhouse and found him helplessly ill. They called the doctor and gave the animals some hay. The doctor ordered his removal to hospital, where he lay ill for many weeks, and then died. The landlord suggested that I should do something; so after much telephoning to the police, to the local medical officer of health, to the hospital almoner, and finally to the county welfare officer, I secured the key and off I went.

The road gave out half a mile from the farm, where a stream had washed away the surface, so I walked. The animals, gaunt after a winter's starvation, showed no interest. The bull, who should have challenged me, turned stiffly away, his ribs showing through his matted flanks. (He fetched 50s. at the subsequent sale.) An earthenware pipe poured sparkling water into a little trough at the side of the farmhouse.

The lock was stiff, but I entered the house. Filth, neglect, staleness struck the senses. The dying man's last meal, six weeks old, was still on the table, along with some unopened circulars, a candlestick and a dirty bandage. A broken window had been patched with plywood, and the plywood was itself disintegrating. The furniture was worm-eaten and packed mainly with worn-out clothing. One drawer contained some writing materials, some old Christmas cards and the stub-ends of used-up cheque books. No will, no hoard of banknotes, no investments, no hint of near relatives.

I went upstairs, each stair gleaming with black candle-grease, and entered the bedroom. The three mice looked daggers at me from the bed and, when I came nearer, were joined by a fourth mouse from inside the pillow. (That, at last, has got it into some sort of sequence.) The pillow was apparently stuffed with chaff. The oak beams had been papered over with a yellow floral design, and a rope was arranged so that the old man could drag himself out of bed. The dressing table yielded nothing, but a tin trunk, looking like a large deed box, provided a bowler hat in mint condition and some women's clothes; all other containers held nothing but moth-eaten rags. Cobwebs hung everywhere.

Downstairs again, I settled down to look through the man's books and papers. Correspondence about the hill farm subsidy; a green form exempting the owner from the dog

tax; a certificate, six years old, enabling the bull to justify his existence in a lawful manner. Backwards and backwards—a commendation for a Clydesdale horse in a 1924 agricultural show; some sepia photographs showing John Smith in R.A.S.C. driver's uniform, 1914–18 pattern, with moustache to match; a family album, including wedding photographs which might or might not relate to an even younger John Smith; Victorian photographs of tense parents and sad-faced children. At last, at the bottom of the deep drawer in the sideboard, school exercise books—John Smith's work of sixty years ago. I opened one idly—Latin exercises, complete with ablatives absolute.

A wasted afternoon; I might as well have stayed in the office.

A sale of the livestock has taken place; one day perhaps someone will turn up to claim the proceeds. (One cannot always wait for the P.D. and A.—the bull would have died before the landlord could have obtained letters of administration as a creditor, and there were no foodstuffs left for the other animals.)

If any budding novelist would care to complete the story, he is quite welcome. Out of deference to ex-naval commanders, I hope he will take care to start with the schoolboy writing his Latin exercises, and press steadily on from there. Too many novelists and solicitors start their work in the middle and leave off nowhere.

"HIGHFIELD"

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal".]

Felonious Acts and Rights of Succession

Sir,—In the course of his discussion of *Re Callaway* in the "Conveyancer's Diary" in your issue of the 30th June, 1956, "A B C" quotes Vaisey, J.'s questions:—

> "Why should the daughter's crime endow the testatrix's son even to the extent of half the testatrix's estate? Seeing that her crime was against the Queen's peace, why should not the Crown, rather than the testatrix's son (whom, one may interpose, the testatrix clearly never intended to benefit) get the benefit from it?"

and comments: "On principle, it seems difficult to counter these questions with any cogent argument."

To my mind, cogent counter-arguments do exist. The learned judge suggests that the testatrix never intended her son to benefit. On the contrary, it seems likely that, had the testatrix known that her daughter could not benefit and that the choice of beneficiary lay between the Crown and her son, she would have chosen her son. The statutory scheme for distribution of an intestate's estate may be taken as giving effect to the average person's wishes and moral obligations to his next of kin, and under this scheme the Crown's place is at the end of the queue. There seems to me no reason for disturbing that order because a disposition has failed under a rule based on public policy, any more than would be the case where such failure occurred for any other reason. There is a danger of relapsing into a theory of forfeiture for felony—otherwise, what is the meaning of the learned judge's reference to a crime "against the Queen's peace"?

If the above view be accepted, it is suggested that where a person is prevented from taking a benefit under a will because his felonious act caused the testator's death, the following rules should have effect:—

(*a*) Where the benefit is given to that person as a member of a class, the other members of that class will take proportionately more.

(*b*) Where the benefit is a limited interest, the interests expectant thereon will take effect.

(*c*) Where an absolute benefit is given—

(i) it will fall into residue, or

(ii) failing a residuary bequest or if the benefit consists of residue or a share of residue there will be an intestacy in respect of the property intended to be given,

and s. 33 of the Wills Act, 1832, will have no application.

K. T. SAMSON.

London, N.13.

REVIEW

Chitty's Queen's Bench Forms. Eighteenth Edition, by R. F. BURNAND, C.B.E., O.B.E., M.A., and D. BOLAND, M.B.E. No. 4 of the Common Law Library. London: Sweet and Maxwell, Ltd. £7 7s. net.

As we have said before in reviewing textbooks intended for the use of the practising solicitor, there is no better measure of appraisal than constant reference in everyday business to the work in question. Over many years we have subjected Chitty's Forms to this searching test, and have never found it barren of suggestion on any but the most unforeseen problems. The eighteenth edition, got up in handsome conformity with the other volumes of the Common Law Library and amply fit to take its place beside Chitty's Contracts and Clerk and Lindsell on Torts, now comes to hand at a time when the practitioner has plenty of new procedural problems to master, and it has been well equipped by the new editors for its task. *Elegit* has not yet quite gone, so the forms relating to it are retained, with a note of the impending doom and a helpful suggestion as to the probable form of the substituted procedure. On the other hand, the new high-pressure summons for directions and the revised rules as to appeals to the Court of Appeal have afforded the editors the opportunity of providing appropriate forms for the assistance of the profession in its conscientious endeavours to cultivate the new approach.

Thus a form is given (to take only a random example of the new matter) for a Notice of Motion on an appeal from the Lands Tribunal. This form concludes, aptly, with a statement of the grounds upon which it is to be contended that the tribunal's determination was erroneous in point of law, clearly in compliance with Ord. 58A, r. 3 (1) (*a*). But the precedents furnished for a Notice of Appeal from a Judge, and for a Respondent's Notice of Intention to contend for a variation of the Judge's order, appear to us to show no corresponding desire to abide by the terms of Ord. 55, rr. 3 (2) and 6 (1). Users of these forms should note that the grounds of appeal or of a contention to vary must now in all cases be specified in the notice, which ought also to go on to suggest the precise form of the order for which the appellant, or the respondent as the case may be, intends to ask the Court of Appeal.

Again, we are constrained to express some disappointment that the terms of the new Ord. 14B should not have been translated into one or more useful forms for the use of the advisers of a plaintiff who desires to have an appropriate action tried without pleadings. On this procedural facility, which has been available now for more than a year, the reader is, so far as we have been able to discover, merely referred to the Annual Practice and its notes.

Despite these sins of omission, if we may respectfully so describe them, it would be ungrateful not to acknowledge the general thoroughness of the work and the mammoth labour of the editors responsible for its revision.

NOTES OF CASES

These Notes of Cases are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible, the appropriate page reference is given at the end of the note.

Court of Appeal

BANKRUPTCY: HUSBAND AND WIFE: MAINTENANCE PAYMENTS: "INCOME" OF BANKRUPT PAYABLE TO BANKRUPT ALTHOUGH VESTING IN TRUSTEE: APPLICATION TO COURT REQUIRED

***In re* Tennant's Application**

Lord Evershed, M.R., Jenkins and Hodson, L.JJ.

6th June, 1956

Appeal from Upjohn, J. ([1956] 1 W.L.R. 128; *ante*, p. 111).

By an agreement made in 1940 on dissolution of marriage, a husband covenanted to pay his ex-wife a monthly sum of £50 in consideration for which the wife agreed to accept such provision "in satisfaction of all rights or claims in respect of maintenance or otherwise which she would otherwise be entitled to enforce under the provisions of the Judicature (Consolidation) Act, 1925." In 1952, the wife was adjudicated bankrupt; she obtained her discharge in 1955 subject to two years' suspension. The husband took out an interpleader summons asking for the direction of the court as to how, as between the wife and her trustee in bankruptcy, he should dispose of the monthly payments under the deed of 1940. Upjohn, J., made a declaration that the income payable to the wife under the deed of covenant continued to be payable to her unless and until an order was made in respect thereof under s. 51 (2) of the Bankruptcy Act, 1914. The trustee appealed.

LORD EVERSHED, M.R., said that he had come to the clear conclusion that Upjohn, J., was right in this case. His lordship referred, *inter alia*, to *In re Huggins; ex parte Huggins* (1882), 21 Ch. D. 85 (C.A.), and *In re Landau* [1934] Ch. 549 (C.A.), and said that it inescapably followed from the combined effect of those two decisions that the monthly sums with which the court was concerned in the present appeal constituted income within s. 51 (2) of the Bankruptcy Act, 1914, and that if the property in these sums did vest in the trustee (which he (his lordship) did not decide) then the effect of the vesting was controlled and qualified by s. 51 (2), so that the trustee's rights and powers in regard to them were limited to those stated in the subsection. He (his lordship) desired to emphasise that he was confining his decision in this appeal to the facts of this case and the questions raised in it. It was said by counsel for the trustee that, if Upjohn, J., was right, then the same result would follow in the cases, for example, of a person who was absolutely entitled to income as life tenant under a settlement of some fund or to an annuity under a testator's will. These cases were not before the court, and he expressed no view upon them. It was also unnecessary to express any view on the contention put forward by counsel for the husband that as a result of the decision of the Court of Appeal in *Bennett* v. *Bennett* [1952] 1 K.B. 249, the wife's promise to accept the provisions of the deed in question in satisfaction of all claims under s. 190 of the Act of 1925 was wholly unenforceable. The decision in the present appeal could not bind in this respect either the husband or the wife if the question of enforceability should thereafter arise. He would dismiss the appeal.

JENKINS, L.J., delivered a concurring judgment.

HODSON, L.J., agreed. Appeal dismissed.

APPEARANCES: *Raymond Jennings*, Q.C., and *Peter Oliver* (*Stafford Clark & Co.*); *I. J. Lindner*, Q.C., and *Edward Grayson* (*C. Butcher & Simon Burns*); *Gilbert Beyfus*, Q.C., and *D. H. Mervyn Davies* (*Vizard, Oldham, Crowder & Cash*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.] **[1 W.L.R. 874**

LANDLORD AND TENANT ACT, 1954: LANDLORD'S INTENTION TO DEVELOP LAND: ABILITY TO CARRY OUT WORK

Reohorn and Another *v.* Barry Corporation

Denning, Birkett and Parker, L.JJ. 7th June, 1956

Appeal from Cardiff and Barry County Court.

The lessees of land used as a car park in the centre of a town and ripe for development applied to the county court for a new lease under the Landlord and Tenant Act, 1954. The town corporation, which owned the land and which had previously served notice on the lessees determining the tenancy, resisted the application on the ground set out in s. 30 (1) (*f*) of the Act, namely, that on the termination of the current tenancy they intended to carry out substantial work of construction on the holding and could not reasonably do so without obtaining possession. At the hearing, the corporation, in proof of their intention under the subsection, produced, *inter alia*, resolutions for a proposed comprehensive development scheme on the land, an outline plan, evidence of consultations with an architect, and a letter from a development company stating that the company was agreed "in principle" to start work at a certain date "subject to the approval of the council and the conclusion of satisfactory building arrangements." No plans had been prepared or agreed, nor any terms as to a building lease, nor was there proof that the developers, who did not give evidence, were financially in a position to carry out the work. The county court judge held that the corporation had discharged the onus of showing a genuine intention to do the work and that they could not do it without possession; and he refused the lessees' application. The lessees appealed.

DENNING, L.J., said that on the facts the question was whether the intention required by the Act was satisfied. The premises were ripe for development and the proposed work was obviously desirable; but the difficulty was to be satisfied that the corporation had the present means and ability to carry out the work. "Intention" connoted an ability to carry it into effect. Though there was no objection to the corporation doing the work by way of a building lease—indeed it was the only way in which they could develop this land—there was here no building lease; and there was still so much to be explored and discussed, and so many factors outside the control of the corporation altogether, that his lordship did not think that there was here that "intention not likely to be changed" which was required before the tenant was to be deprived of a new lease. His lordship looked at the intention in this case as that existing at the date of the hearing; and at that date the intention was not sufficiently proved. The tenant was accordingly entitled to the extension of his tenancy, but on such terms as would not in any way impede the development of the land in due course as and when the intention and the ability were both present. He would allow the appeal and grant a new tenancy (on terms which his lordship stated).

BIRKETT, L.J., delivered a concurring judgment.

PARKER, L.J., also concurring, said that where the contemplated development was not going to be carried out by the landlords through their servants or agents but by means of a building lease, the results would depend ultimately, not on the volition of the landlord but on the volition of the proposed developer. In such a case the landlord must prove that the developer and he had agreed on at least the essential terms of the lease, even though it had not been signed. In the present case the parties had not nearly reached that stage. The county court judge here had been influenced by the landlords' evidence that they could not go further with the scheme unless they got vacant possession. What they no doubt meant was that they were not prepared to incur expense until they knew they could get possession. However reasonable that attitude might be from the financial angle, it would not dispense with the proof required to enable them to oppose the tenant's claim successfully. If such proof could only be adduced by incurring such expense, the landlords must incur the expense and risk failure to get possession. Appeal allowed.

APPEARANCES: *J. Raymond Phillips* (*J. H. Milner & Son*); *David Pennant* (*Lewin, Gregory, Mead & Sons*, for *J. Clement Colley*, Town Clerk, Barry).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[1 W.L.R. 845**

PUBLIC RIGHT OF WAY OVER PRIVATE LAND: RETROSPECTIVE OPERATION OF RIGHTS OF WAY ACT, 1932

Fairey *v.* Southampton County Council

Denning, Birkett and Parker, L.JJ. 19th June, 1956

Appeal from Divisional Court ([1956] 2 W.L.R. 517; *ante*, p. 133).

In 1954 a landowner applied to quarter sessions for a declaration that no right of way existed over a path on his land shown as a

public path on a map prepared by the local authority. Quarter sessions found that the path had been used without interruption or objection by the public from 1885 to 1931, though there was not sufficient evidence on which an intention to dedicate or not to dedicate could be presumed at common law; that on an occasion in 1931 the then owner had objected to the use of the path by the public other than local residents; and that thereafter he and the present landowner successively had turned such persons off the path and by so doing had shown an intention not to dedicate the path as a highway. The landowner appealed on the issues as to (1) the date at which the right of the public to use this way had been "brought into question" within s. 1 (6) of the Rights of Way Act, 1932 (which came into force in January, 1934), and (2) whether that Act could apply retrospectively to give the public a statutory right of way under s. 1 by reason of twenty years' prescriptive user which had terminated before the Act came into operation.

DENNING, L.J., said that the Act of 1932 had introduced a new means by which the public might acquire a right of way, namely, by prescription for the period of twenty years next before their right to use it was "brought into question." In order for the right of the public to be "brought into question" the landowner must challenge it by some means sufficient to bring home to the public that he was challenging it, so that they might be apprised of the challenge and have a reasonable opportunity of meeting it. On the findings of quarter sessions, this landowner brought the public right into question in 1931, and thereafter showed a sufficient intention not to dedicate the path as a highway. But there had been twenty years' user before 1931, that was, before the Act was passed in 1932 and before it came into operation in 1934. Could the public acquire a right of way by twenty years' user before the Act? And was the Act retrospective to that extent? His lordship did not consider this Act a procedural Act. It affected the substantive law in a number of respects, and therefore it could only be given a retrospective operation if such a construction appeared very clearly on the terms of the Act or arose by necessary and distinct implication. But such was the case here. The whole tenor of the Act was to establish a public right by twenty years' user; and the wording of s. 2 (1) carried with it the necessary and distinct implication that, except as therein stated, the Act applied to enjoyment of the way before the commencement of the Act. Therefore, the Act was retrospective; and once the twenty years' enjoyment had been had as of right by the public, then whether it was before or after the Act, the way was by the Act a highway; and the landowner could not escape from that position by saying that he never intended to dedicate it as a highway. The appeal should be dismissed.

BIRKETT, L.J., concurring, said that the main purpose of the Act of 1932 was to simplify the procedure when it was sought to establish a way as a public highway. There was no fixed method laid down by this Act by which the right was to be "brought into question"; and the act of this landowner in turning members of the public back in 1931 was "bringing this right into question." He agreed that while this Act was not confined to procedure its intention was that it should be retrospective in operation.

PARKER, L.J., also concurring, agreed with Stable, J. (who dissented in the Divisional Court), that though this Act admittedly dealt with matters of procedure in part, it gave or defined legal rights. But, having regard to its object and language, it was retrospective in operation. Appeal dismissed.

APPEARANCES: *Percy Lamb*, Q.C., and *J. P. Widgery* (*Ashurst, Morris Crisp & Co.*); *J. Scott Henderson*, Q.C., and *M. G. Polson* (*Theodore Goddard & Co.*, for *G. Andrew Wheatley*, Winchester).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[3 W.L.R. 354**

Chancery Division

INCOME TAX: PROFITS TAX: VALUE PAYMENTS MADE TO PROPERTY DEALING COMPANY: WHETHER CHARGEABLE

London Investment and Mortgage Co., Ltd. v. Inland Revenue Commissioners

Same *v.* F. N. Worthington (H.M. Inspector of Taxes)

Upjohn, J. 10th May, 1956

Appeal from the Special Commissioners.

A company, which carried on the trade of property dealing, received value payments under the provisions of the War Damage Act, 1943, in respect of some of its properties which had been damaged and destroyed by enemy action. The Special Commissioners held that, in computing the balance of profits for taxation purposes, the company should in general include value payments as receipts of its trade, but that where a property had been, was being, or was intended to be repaired or rebuilt, sums received in respect of such payments should not be included as receipts, but should be deducted from the amount expended on rebuilding. The company appealed against the general conclusions of the commissioners; the Crown cross-appealed against the conclusions regarding the properties intended (etc.) to be rebuilt. The question for determination in appeals from the decision of the Special Commissioners was whether value payments arising under the provisions of the War Damage Acts, 1941 and 1943, and paid to the appellant company were receipts of the company's trade to be brought into account in computing the balance of profits and gains for taxation purposes.

UPJOHN, J., said that the scheme of the War Damage Act, 1943, was that the contributions made and indemnities given were by s. 66 treated as outgoings of a capital nature; while, by s. 113 (as re-enacted and amended by s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949) it was provided by subs. (1) that payments or expenditure to which the section applied should not be deducted from profits for the computation of profits for income and profits tax purposes, and by subs. (4) such expenditure was defined as expenditure on repairing or making good war-damaged property in so far as the owner was entitled to war damage compensation in respect thereof. The taxpayers' contentions were that by s. 28 payments were to be treated as capital under a national scheme; if damage resulted, the money expended on repair could not be treated as expenditure for tax purposes; further, the war damage financial transactions were not part of the company's financial transactions, but in respect of their capacity as owners of land; that, on the authorities, an expense falling on a trader was not deductible if it fell on him in a capacity other than that of a trader, and similarly with payments received. The Crown contended that as the company's trade was dealing in property, the war damage receipt was a profit or gain, as where stock-in-trade was not sold but paid for by insurance after a fire (*Gliksten's* case [1929] A.C. 381), or requisitioned by the State (*Newcastle Breweries* case (1927), 43 T.L.R. 476); where stock-in-trade was turned into money, that money was a trade receipt even though it was not received in the ordinary course of business. But that proposition was too wide. Under the War Damage Acts, every property owner had to make capital payments by instalments, and on the true construction of s. 28, money received if expended on restoration was not deductible as an expense. Parliament was not considering trading, but imposing on landowners an obligation to contribute with a corresponding benefit if disaster ensued; that was something outside the area of trading operations. The company's payments and receipts were made not in their trading capacity, but as owners of land; the receipts were not a trading profit. Taxpayers' appeals allowed. Crown's appeals dismissed.

APPEARANCES: *J. Senter*, Q.C., and *D. Miller* (*R. C. Bartlett and Co.*); *G. Cross*, Q.C., and *Sir R. Hills* (*Solicitor of Inland Revenue*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 858**

Queen's Bench Division

DOMESTIC TRIBUNAL: CONTROL BY COURT: STEWARDS OF NATIONAL HUNT COMMITTEE

Davis *v.* Carew-Pole and Others

Pilcher, J. 26th March, 1956

Action.

The plaintiff, a livery-stable keeper, was required to attend a meeting of the stewards of the National Hunt Committee, who were inquiring into an allegation that the plaintiff, an unlicensed trainer, had trained a horse for a steeplechase contrary to the National Hunt Rules. The plaintiff attended the inquiry when, without any prior notification, his alleged activities in connection with the training of two other horses were considered. The plaintiff was declared a disqualified person under the rules. In an action against the committee claiming a declaration that the stewards' decision was *ultra vires* and void and an injunction restraining the defendants from treating the plaintiff as a disqualified person, Pilcher, J., held that, on the evidence and on

the true construction of the rules, the stewards were not entitled to declare the plaintiff a disqualified person. A claim by the plaintiff for damages was abandoned.

PILCHER, J., said that the mere fact that the accused person has not in a particular case been given formal notice of all the matters in which his conduct is to be called in question does not necessarily entitle him to contend successfully that the proceedings of a domestic tribunal were not conducted in accordance with the principles of natural justice, and in the circumstances of the present case he was not prepared to hold, as a matter of law, that the plaintiff was entitled to succeed in his contention that the inquiry was not held in accordance with the principles of natural justice, because the plaintiff was not, on the facts of the case, prejudiced by the lack of notice. Counsel for the defendants contended that if it were found that the stewards had acted in accordance with natural justice, in the absence of a contract between the plaintiff and the defendants, the plaintiff had no cause of action. It was no doubt true that where no tort was alleged, and no contract express or implied was made out, no claim for damages could succeed in cases of this type. But even if there was no contractual relationship between the parties the plaintiff was in the circumstances entitled to the declaration. From the moment, however, that the plaintiff submitted to the jurisdiction of the stewards by attending the inquiry he was in contractual relationship with the stewards and might have been entitled to recover damages. Judgment for the plaintiff.

APPEARANCES: *Gerald Gardiner*, Q.C., and *Dennis Lloyd* (*Rider, Heaton, Meredith & Mills*, for *Burridge, Kent & Arkell*, Shaftesbury); *Cyril Salmon*, Q.C., and *H. P. J. Milmo* (*Charles Russell & Co.*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] **[1 W.L.R. 833**

MAGISTRATE: REMAND IN CUSTODY FOR MEDICAL REPORT: OFFENCE NOT PUNISHABLE BY IMPRISONMENT

Boaks *v.* Reece

Pilcher, J., and a jury. 13th June, 1956

Jury action.

On 10th October, 1955, the plaintiff, William George Boaks, was convicted by the Bow Street magistrate of offences under s. 72 of the Highway Act, 1835, and regs. 89 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955, neither of which offences carried a sentence of imprisonment. The plaintiff, who was conducting a road courtesy campaign, had a number of previous convictions for similar offences, some of them before the same magistrate. The magistrate, before passing sentence, remanded the plaintiff in custody for seven days for a medical report, and pursuant to the magistrate's order the plaintiff was taken in custody to Brixton Prison, where from 3rd October to 10th October, 1955, he was detained in the prison hospital ward. The plaintiff claimed damages against the magistrate for wrongful imprisonment and the magistrate, by his defence, alleged that the order remanding the plaintiff in custody had been made pursuant to, and was authorised and rendered lawful by, ss. 14 (3) and (4) and 105 (1) (*a*) of the Magistrates' Courts Act, 1952. The plaintiff contended that the powers of remand contained in s. 14 (3) were limited to offences punishable by imprisonment.

PILCHER, J., said that s. 14 (3) was general in its terms and that it was clear that there must be many cases where the offences committed did not carry a prison sentence but where it was desirable for "inquiries to be made," and those inquiries might often necessarily be inquiries into the mental and physical health of the person who had been convicted. It had been argued that inasmuch as s. 26 (1) of the Magistrates' Courts Act, 1952, which dealt with remand for medical examination, only covered cases in which the accused person could be sentenced to imprisonment, it followed that the words of s. 14 (3) "for the purpose of enabling inquiries to be made" must be limited to inquiries which were not of a medical character or into the physical or mental health of the accused. It was clear, on the facts of the case, that the conduct of the plaintiff, which was known to the defendant, was such as might well have caused him to think that an inquiry into the plaintiff's mental condition was desirable. His lordship had no doubt that, inasmuch as the Act of 1952 was a consolidating Act, and in spite of the fact that no such words appeared in that Act as appeared in s. 26 of the Criminal Justice Act, 1948, namely, "without prejudice to any powers exercisable by a court under" another section, none the less the defendant still had powers under that section, being satisfied, as he was, that it was desirable that inquiries should be made, to order inquiries and a report on the mental and physical health of the plaintiff. Judgment for the defendant.

APPEARANCES: The plaintiff appeared in person; *H. J. Phillimore*, Q.C., and *Rodger Winn* (*Treasury Solicitor*).

[Reported by Miss J. F. LAMB, Barrister-at-Law] **[1 W.L.R. 886**

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time :—

London County Council (General Powers) (No. 2) Bill [H.C.] [26th June.
Pier and Harbour Provisional Order (Great Yarmouth Port and Haven) Bill [H.C.] [22nd June.
Pier and Harbour Provisional Order (Wisbech Port and Harbour) Bill [H.C.] [22nd June.
Underground Works (London) Bill [H.C.] [22nd June.
Valuation and Rating (Scotland) Bill [H.C.] [28th June.

Read Second Time :—

Family Allowances and National Insurance Bill [H.C.] [28th June.
Glasgow Corporation Order Confirmation Bill [H.C.] [28th June.
To confirm a Provisional Order under the Private Legislation Procedure (Scotland) Act, 1936, relating to Glasgow Corporation.
Restrictive Trade Practices Bill [H.C.] [26th June.
Workmen's Compensation and Benefit (Supplementation) Bill [H.C.] [28th June.

Read Third Time :—

Charity of Frances Barker and Certain Other Charities (City of York) Bill [H.C.] [28th June.
Consolidated Municipal Charity and Certain Other Charities (Ludlow) Bill [H.C.] [28th June.
Hospital of Robert Earl of Leicester Charity (Warwick) Bill [H.C.] [28th June.
London County Council (Money) Bill [H.C.] [26th June.
People's Dispensary for Sick Animals Bill [H.C.] [26th June.
Sutton's Hospital (Charterhouse) Charity Bill [H.C.] [28th June.
Teachers (Superannuation) Bill [H.C.] [26th June.

In Committee :—

Agriculture (Safety, Health and Welfare Provisions) Bill [H.C.] [28th June.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read Second Time :—

Barnsley Corporation Bill [H.L.] [25th June.
British Caribbean Federation Bill [H.C.] [29th June.
Governors' Pensions Bill [H.C.] [29th June.
Rhyl Urban District Council Bill [H.L.] [25th June.

Read Third Time :—

Death Penalty (Abolition) Bill [H.C.] [28th June.
Newcastle-upon-Tyne Corporation Bill [H.C.] [29th June.
Tyne Tunnel Bill [H.L.] [27th June.

In Committee :—

Finance (No. 2) Bill [H.C.] [26th June.

B. QUESTIONS

COMPANIES (ANNUAL RETURNS)

Mr. P. THORNEYCROFT said that the Registrar of Companies had not been able fully to restore the pre-war practice of sending reminders to companies which failed to file an annual return. Long arrears existed in only a small proportion of cases and were being overtaken. [25th June.

REPAYMENT OF IMPROVEMENT GRANTS

Mr. SANDYS said that in a circular issued last October he had asked local authorities to consider sympathetically any application to repay an improvement grant, thus freeing the property from restriction on sale, where the sale arose from some reasonable cause, and to consult him before refusing such an application. Any further steps would require amending legislation. [25th June.

VENDORS' OBLIGATIONS OF DISCLOSURE

Asked if he would make it a legal obligation on any vendor of a dwelling-house to state specifically that the property was subject to or immediately liable to a compulsory purchase or clearance order where it might be affected by such orders within a reasonable period, the ATTORNEY-GENERAL said that a proposal to extend vendors' obligations of disclosure was advised against by a majority of the Stainton Committee on Local Land Charges in 1952. [26th June.

ADOPTION OF CHILDREN

The HOME SECRETARY said that the Government intended to introduce legislation on the adoption of children as soon as Parliamentary time could be found. [28th June.

REVIEW OF AGRICULTURE AND AGRICULTURAL HOLDINGS ACTS

Mr. AMORY said that he hoped that discussions on the operation of Pt. II of the Agriculture Act, 1947, and the Agricultural Holdings Act, 1948, with the organisations concerned would start within the next few weeks. [28th June.

STATUTORY INSTRUMENTS

Additional Import Duties (No. 2) Order, 1956. (S.I. 1956 No. 950.)

Bradford Corporation Water Order, 1956. (S.I. 1956 No. 931.) 5d.

Food and Drugs (Scotland) Act, 1956 (Appointed Day) Order, 1956. (S.I. 1956 No. 955 (C.4) (S.43).)

Food Hygiene (Amendment) (No. 1) Regulations, 1956. (S.I. 1956 No. 938.) 5d.

Import Duties (Drawback) (No. 7) Order, 1956. (S.I. 1956 No. 951.) 5d.

Inland Post Amendment (No. 2) Warrant, 1956. (S.I. 1956 No. 977.) 5d.

Irwell Valley Water Board (Trunk Main) Order, 1956. (S.I. 1956 No. 956.) 5d.

London-Norwich Trunk Road (Harlow Diversion) Order, 1956. (S.I. 1956 No. 941.) 5d.

London Traffic (Prescribed Routes) (Dagenham) (Amendment) Regulations, 1956. (S.I. 1956 No. 949.)

Motor Vehicles (Authorisation of Special Types) (Amendment) Order, 1956. (S.I. 1956 No. 932.)

National Gallery (Lending outside the United Kingdom) (No. 1) Order, 1956. (S.I. 1956 No. 942.)

Paper Box Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1956. (S.I. 1956 No. 954.) 6d.

Retention of Cables, Mains and Pipe under and over Highways (East Riding of Yorkshire) (No. 2) Order, 1956. (S.I. 1956 No. 952.) 5d.

Safeguarding of Industries (List of Dutiable Goods) (Amendment No. 10) Order, 1956. (S.I. 1956 No. 939.) 5d.

Draft **Sale of Food** (Weights and Measures : Bacon and Ham) Regulations, 1956. 5d.

Stopping up of Highways (Bath) (No. 2) Order, 1956. (S.I. 1956 No. 935.) 5d.

Stopping up of Highways (Cornwall) (No. 2) Order, 1956. (S.I. 1956 No. 933.) 5d.

Stopping up of Highways (Derbyshire) (No. 6) Order, 1956. (S.I. 1956 No. 936.) 5d.

Stopping up of Highways (Isle of Ely) (No. 1) Order, 1956. (S.I. 1956 No. 959.) 5d.

Stopping up of Highways (Kent) (No. 12) Order, 1956. (S.I. 1956 No. 940.) 5d.

Stopping up of Highways (Lancashire) (No. 11) Order, 1956. (S.I. 1956 No. 937.) 5d.

Stopping up of Highways (Wallasey) (No. 2) Order, 1956. (S.I. 1956 No. 934.) 5d.

Superannuation (Civil Service and Jersey Civil Service) Transfer Rules, 1956. (S.I. 1956 No. 976.) 5d.

Treasury (Loans to Local Authorities) (Interest) (No. 3) Minute, 1956. (S.I. 1956 No. 958.) 5d.

Wages Regulation (Licensed Non-Residential Establishment) (Managers and Club Stewards) Order, 1956. (S.I. 1956 No. 953.) 10d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

NOTES AND NEWS

PRACTICE NOTE

DIVORCE—INCURABLE UNSOUNDNESS OF MIND —EVIDENCE

It is directed by the President that in proceedings for divorce on the ground of incurable unsoundness of mind, application for leave to read affidavit evidence from medical officers may, with the consent of the respondent's guardian *ad litem*, be made to the judge at the trial. Any affidavit which is to be the subject of such an application shall be lodged in the Registry in which the cause is proceeding and, if in order, will be endorsed by the Registrar and filed. Where the Official Solicitor is acting as guardian *ad litem* of the respondent, it should be ascertained whether he consents to the reading of affidavit evidence, and, if so, what is the nature of the evidence required. The Practice Note of 18th February, 1946, entitled, "Evidence upon Affidavit" is hereby cancelled.

B. LONG,
3rd July, 1956. Senior Registrar, Divorce Registry.

Honours and Appointments

Mr. M. C. JEFFRIES, deputy solicitor to the Eton Rural District Council, has been appointed deputy clerk to the Rickmansworth Urban District Council.

Mr. THOMAS MILWYN LLOYD JENKINS, Registrar of the Newtown County Court and District Registrar in the District Registry of the High Court of Justice in Newtown, has been appointed to be in addition the Registrar of the Llanidloes County Court as from 1st July in succession to Mr. Arthur Davies, who retired on 30th June.

Mr. GEORGE MACAVOY has been appointed deputy clerk to the Liverpool City Justices in succession to Mr. Henry Harris, who has retired.

PRINCIPAL PROBATE REGISTRY

The Principal Probate Registry other than the Personal Application Department will be closed for non-contentious probate business on Saturdays as from 7th July, 1956.

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